COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2014-SC-000329-DE
2014-SC-495

C. D. G. APPELLANT/CROSS-APPELLEE

v.

N. J. S. APPELLEE/ CROSS APPELLANT

ON APPEAL FROM KENTUCKY COURT OF APPEALS
ACTION NO. 2013-CA-001110-MR
AND
AND JEFFERSON CIRCUIT COURT
ACTION NO. 07-J-500757

REPLY BRIEF FOR APPELLANT / CROSS-APPELLEE

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of Appellant/Cross Appellee's Reply Brief was mailed, via U.S. Mail, postage prepaid to *Nancy J. Schook, 809 Bedfordshire Road; Louisville, KY 40222;* and Hon. Denise Brown, Jefferson Circuit Court, Family Div. 7, 700 W. Jefferson Street, Louisville, KY 40202, on the 19th day of February, 2015. It is further certified that the record on Appeal was not withdrawn.

By: _____
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BRIEF FOR APPELLANT/CROSS-APPELLEE

STATEMENT OF POINTS AND AUTHORITIES

C. The Trial Court's Order That C.D.G. should recoup the overpaid Child Support Amount is Supported by the *Clay* Decision.

D. Federal Law Does not Prohibit Recoupment from N.J.S.

COUNTER-STATEMENT OF THE CASE

Appellant/Cross-Appellee, C.D.G., for his Reply and Response submits that Appellee/Cross Appellant, N.J.S. has intentionally omitted or misstated the record facts in this matter. C.D.G., therefore, restates portions of his initial Statement of the Case with a focus on the actual Court record and indicating the inaccuracies or omissions of N.J.S.'s submission.

First, **N.J.S. represents to this Court** that C.D.G. asked her to hide the paternity of M.S., born December 12, 2002 (the "Child"), **"until after she left his employment and obtained a divorce."** [N.J.S. Brief at p. 6]. No such request ever took place, and is not of evidence before this Court. The actual facts are that when the Child was born, N.J.S., was married to and living with Mr. Joseph Schook ("**Mr. Schook**") [R 001, 006-008]. N.J.S. had been married to Mr. Schook since 1981 and remained married to him until May 2007, more than four (4) years after the Child's birth. [R 006].

N.J.S. contends that she filed a paternity action against C.D.G. in March 2007 to obtain child support from C.D.G. [N.J.S. Brief at p. 6]. At the same time, she omits the existence, and circumstances of her divorce action. The actual facts are that the Schook divorce action was initiated by N.J.S. in **October 2006, only after N**.J.S. became pregnant with her sixth child, fathered by Mr. Laurence Zielke, Esq. [[R 006-007].

From the date of the Child's birth through October 2006, both N.J.S. and Mr. Schook continuously represented to the world that Mr. Schook was the Child's father. [R 080, 681-83, VR 30:3/13/13: 03:16-19]. It was not until N.J.S. filed her divorce Petition that she first articulated to anyone that the minor Child, and her sixth child might not be the children of Mr. Schook. [Id at 681-83]. From 2002 until 2007, Mr. Schook believed that he was the biological father of the Child. [R 006-008; Affidavit of Mr. Schook, R 681-83; VR 30:3/13/13: 03:16:19,

attached to Initial Brief at **Ex. C**]. It was not until the divorce was filed that N.J.S. indicated that the Child ***might*** be the child of C.D.G. [Id.].

From October 2006 to May 2007, extensive litigation regarding custody of all six of N.J.S.'s children and paternity of the Child, proceeded in the *Schook* divorce action. In that action, Mr. Schook claimed to be the Child's biological father, and vehemently objected to any paternity testing for the Child. [R 007-008]. He repeatedly sought a ruling from the trial court that he was the father of the Child. [Id]. Mr. Schook asserted that he had been convinced by N.J.S. that he was the father of the Child, and had assumed that role willingly and lovingly. [R 008; 681-83]. N.J.S. had represented that Mr. Schook was the Child's father, and listed him as the father on the birth certificate. [Id; R 246; 740].

It was not until March 19, 2007, that N.J.S. initiated the underlying Paternity Action against C.D.G. [R 001-015]. Before that date, N.J.S. had never sought to have C.D.G act as the father of the Child, nor had she taken any action to confirm paternity by paternity test. [R 006-008; 081]. She cannot now stand before this Court and accuse C.D.G. of being the absent father, when she purposefully fostered a relationship between Mr. Schook and the Child, and delayed Paternity testing for nearly five years.

N.J.S. contends that she mediated an agreement with C.D.G. on child support issues in April 2008, with the idea in mind that his social security retirement dollars would be added to the child support. [N.J.S. Brief at p. 6]. **N.J.S. further contends that she set the amount of support "low" because of the anticipated receipt of SSA benefits for the Child.** [N.J.S. Brief at p. 6]. These are nothing less than self serving, and overtly false representations given the Marital Settlement Agreement with Mr. Schook, and the facts of this matter.

What actually happened was that on April 17, 2007 N.J.S., less than 30 days after filing the Paternity Action, N.J.S. and Mr. Schook, entered into a Marital Settlement Agreement. [R 095-111]. The Agreement indicates that Mr. Schook has the Child no less than ½ of the time. [R 095-111; 543-553, Agreement, Initial Brief at **Ex. D**]. Mr. Schook cared for and loved the Child and had a strong father/daughter relationship with her. C.D.G. respected this relationship and the efforts that Mr. Schook undertook to protect it. Importantly, the Marital Settlement Agreement permits Mr. Schook to apply for his own Social Security Disability ("SSD") benefits. [R 545]. In this litigation it was revealed that Mr. Schook had been receiving SSD benefits **since 2008**, or before, and N.J.S. knew about it. [R 682]. Those SSD benefits include a sum for all of his dependents, **including the Child**. [Id]. The amount awarded to Mr. Schook for the Child was $175.00 per month. [R 682]. Only one father can claim a child. At the time of the April 2008 child support agreement, Mr. Schook was caring for the Child ½ of the time, and claiming her as his own dependent. Once C.D.G. reached 65, N.J.S. did not contact him to establish benefits. N.J.S. did not take any action to adjust child support for the four year period between the Agreed Judgment and the current dispute. [R 342].

N.J.S. claims that C.D.G. **"refused to live up to his obligations, costing N.J.S. substantial sums in attorneys' fees"** are again based upon a liberal re-writing of history and outright fabrication. [N.J.S. Brief at p. 6]. The Trial Court ruled regarding paternity testing on October 23, 2007. [R 136]. It was not until **January 18, 2008**, that N.J.S. filed her very ***first*** Motion requesting child support from C.D.G. [R 142-146]. The parties attended mediation on April 17, 2008, and entered into an Agreed Judgment. [R 161-162]. As part of Agreed Judgment, paternity was established, and Child Support was set at $775.00 per month. The Parties agreed that C.D.G. ***did not have a child support arrearage*** or ***other amounts due***. [*Id.*]

N.J.S. agreed to be fully responsible for the Child's health insurance and medical expenses.[1] [*Id.*].

N.J.S. accuses C.D.G of failing to advise the Social Security Administration ("SSA") that N.J.S. was the "sole custodial parent ...." [N.J.S. Brief at 7]. In fact, such a representation to the SSA would have been false given the 50/50 parenting relationship that N.J.S. shares with Mr. Schook. Further, the record evidence before this Court is that on November 29, 2011, when C.D.G applied for retirement benefits from the SSA, he advised the SSA that the Child was his biological child. [R 180; 567; 571; 730; VR 30:3/13/13 03:36:40-03:37:40]. He was then advised by the SSA that the custodial parent would need to complete the application for the Child's benefits. [R 180; VR30:3/13/13: 03:36:40-03:37:40].

Next, N.J.S. submits to this Court that she knew nothing of the SSA process until March 2012. The actual facts are that C.D.G. notified N.J.S. of this benefit and his application the same day, **November 29**, and agreed to meet her at SSA to complete the process. [VR 30:3/13/13:03:37:45; Timeline of Events, attached in Initial Brief, **Ex. E**]. N.J.S. representations to the Trial Court that she knew nothing of the application until March 2012 are completely false. [VR 30:3/13/13: 03:37:55-03:40:00]. They are also contradicted by her assertions in this matter that she considered the benefits when she set the initial support amount.

C.D.G.'s application meant that from May 2011 forward, the Child through her custodian, was entitled to receive an amount of money based upon C.D.G.'s contribution and employment record. [R 569]. C.D.G.'s contributions would result in a payment to the Child of $1256.00 per month going forward, plus a lump sum amount of $23,780 for the period of May 2011 to March 2013. [R 569, 727].

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[1] N.J.S. agreed in her Marital Settlement with Mr. Schook that she would be responsible for all health insurance and medical expenses for all of her Children. [R 097].

N.J.S. states that she "promptly went to the social security office and began the process of applying for the child's benefits." [N.J.S. Brief 7]. This representation is not supported by the facts of this case. The facts are that from November 2011 to March 2012, C.D.G. attempted to get N.J.S. to meet him at the SSA to complete the application process and obtain payment of his SSA funds. [R 542 Timeline, VR 30:3/13/13: 03:36:40-03:40:00]. He contacted her on numerous occasions, drafted a full settlement agreement regarding the matter, and thought that N.J.S. and he had reached an agreement regarding how the benefits would be applied against his Child Support. [R 542 Timeline, VR 30:3/13/13: 03:36:40–03:40:00]. However, N.J.S. refused to sign the agreement or otherwise meet C.D.G. at the SSA for **13 months** from November 2011 until **compelled by the Trial Court in December 2012**. [Id].

In addition to refusing C.D.G's requests to appear at the SSA office, N.J.S. objected to a ruling and a hearing regarding C.D.G.'s March 14, 2012 Motion for a SSA benefit Credit Against Child Support and for Recoupment of any over payment (the "**Credit Motion**"). [R 179-188]. She continued her objections while accepting C.D.G's child support payments.

Frustrated with the lack of cooperation from N.J.S., and resolution, in December 2012, C.D.G. asked the Trial Court to compel N.J.S.'s assistance and cooperation in meeting with C.D.G. at the SSA to determine why the SSA child benefits had not been paid, and to grant a hearing on his pending Motions. [R 197-98]. N.J.S. again objected claiming again that C.D.G's Credit Motion was not ripe until the monies were paid. [R 201-10]. The Trial Court granted C.D.G.'s motion compelling N.J.S.'s participation and to set a hearing on the matter for March 13, 2013. [R 216, 218]. Even after being compelled to attend the SSA meeting, she refused, and instead sent her attorney Mr. Lawrence Zielke, Esq. to the meeting.

N.J.S. states that after she "promptly went to the social security department ... " in March 2012, **she *then* knew that Mr. Schook was receiving social security benefits.** [N.J.S. Brief at 7]. **She further contends that she never did anything to delay "a ruling by social security," or the trial court in this matter.** [N.J.S. Brief at 7-8]. However, for more than a year, N.J.S. and her Counsel, Mr. Zielke, failed to disclose to C.D.G and the Trial Court that the SSA had delayed payment of Child Benefits because it had been paying Child Benefits for the Child based on the Social Security record of Mr. Schook. [R 558 at ¶1; 563 at ¶3; 573; 677-79; VR 30: 3/13/13: 03:44:44-03:46:18]. A child cannot receive benefits based upon the record of two fathers. While N.J.S. maintained her objection before the Trial Court, and accepted $775.00 from C.D.G., she had been secretly corresponding with the SSA and coercing Mr. Schook regarding the payment of the benefits. In order to start benefits, and to hide the deception evident in the dual father problem, N.J.S. made representations to SSA that she was ***not*** the custodial parent, and that Mr. Schook was. [R 682 at ¶ 9, Initial Brief, Ex. C, Affidavit of Mr. *Schook*]. SSA then began to investigate the dual father issue, and who was the custodial parent. When N.J.S. realized that SSA may pay the benefits to Mr. Schook, she retracted her previous representations, claimed she was the custodial parent, and threatened to appeal any SSA decision that did not award the benefit dollars to her all the way to the Federal District Court. [R 562-63]. These deceptions, threats, and tactics further delayed the benefit payments to the Child.

Finally, **N.J.S. contends that the Trial Court never ruled on her Motion to Increase Child Support.** [N.J.S. Brief at p. 8-9]. On February 18, 2013, N.J.S., after nearly five years, did file a Motion for Increase in Child Support. [R 342-48]. However, this Motion was actually in response to C.D.G.'s Motion to suspend his child support obligation, and require that all future support payments be placed in escrow pending the Trial Court's decision on the pending Credit

Motion. [R 224-243]. What N.J.S. does not admit to this Court is that she failed to comply with Family Court Rules of Procedure, or to properly Notice the Motion, and the Motion was remanded from the Docket with instructions to re-file. [R 360-66; and Trial Court Order at R 798]. N.J.S. never requested that the Motion be set on the Trial Court's docket, nor filed a Child Support Worksheet, or contacted the Trial Court's secretary as required by the Order. [R. 798].

Regardless, based upon the stated income and the record before the Trial Court, the Parties' incomes are only *slightly* above the Guidelines, having combined monthly gross incomes that total $16,057, just $1057 over the maximum of $15,000. [R 718-25, 684-700]. A calculation based upon the highest Guideline amount would support a decrease to $531.00 per month. [R 722]. The current SSA child benefit of $1256.00 is more than double that amount.

N.J.S. represents to the Court that she was "never under any Court Order to escrow or preserve monies she received either through C.D.G. or social security and used all monies received solely for the benefit of the child." [N.J.S. Brief 8]. However, she fails to acknowledge that C.D.G. filed his first escrow motion in February 2013, and his second Motion to escrow the Child Support and Social Security funds, on March 20, 2013 after C.D.G. learned that Mr. Schook had received the lump sum benefits totaling $23,780. [R 711-13]. She fails to note that she opposed this Motion at the March 25, 2013 Trial Court Motion hour. [VR *52:*3/25/13: 9:10:00 to 9:14:00]. She fails to state that as of the March 25, 2013, N.J.S. advised the Trial Court that she was going to get the money, but did not yet have it. N.J.S. fails to acknowledge that she knew C.D.G.'s requested that the Court order the escrow all funds, and that the Trial Court had decided to take the issue under submission for decision. [R 714].

Despite all of this knowledge, just ***three*** (3) days later, on ***March 28, 2013***, N.J.S. filed her Supplemental Memorandum In Opposition to C.D.G's Motions. [R 715-17]. In her

Supplement, she declared that: "[N.J.S.] has received the $23,780 payment and has expended that payment for the current and future needs of [the Child]." [R 716]. However, in her Supplement, N.J.S. failed to present any information to the Trial Court of just what the monies had been used for and why. [R 715-17]. At that time, N.J.S. was well aware of all of the Motions regarding recoupment, overpayment, and to escrow the funds. She knew that the monies she received were in dispute, and amounted to double payment to her. She knew that the Trial Court would soon issue an Order regarding the funds. N.J.S. knew that she had already received $775.00 in child support from C.D.G for the entire twenty-two (22) month challenged period, and as the recipient of funds for the same period, she had been overpaid benefits in the amount of $17,050. N.J.S.'s knowledge of the dispute, and her delay combined with her intentional attempt to deceive the Trial Court is bad faith and must not be tolerated or rewarded.

N.J.S. represents to this Court that she spent all of the SSA lump benefits for the Child. [N.J.S. Brief 8]. It was not until, May 6, 2013, after the Trial Court submitted its Order requiring N.J.S. to refund the overpaid child support, that N.J.S. revealed how she had *allegedly* "spent" the lump sum benefits. [R 744-95]. In this submission, N.J.S. failed to provide any information regarding the ***actual*** source of the funds used to pay these expenditures. The proposed expenditures came from two different checking accounts, and credit card charges. [Id.]. It is likely that such payments were made from her regular income of over $156,000 per year. [R 686-700].

N.J.S.'s claims of expenditure are not credible. N.J.S.'s post ruling payment ledger indicates that she is willing to claim that she was spending the retroactive lump sum funds ***before*** she received them. [R 753-754]. The letter from Social Security is dated March 20, 2103, and she did not actually receive the funds until after March 25, 2013. Yet, she claims credits from

spending moneys nearly a month before the funds were received. [R 781-82]. She submitted a payment for the 2012 tax bill for the home of Mr. Schook. This bill was her sole obligation as part of her divorce Agreement with Mr. Schook. [R 784]. She provided a copy of a check for a $7,955.00 payment made for the schooling of the Child and her **siblings**, for the school year 2013-14, an amount not due for many months. [R 766]. She spent $4,000 for "educational accounts" for 2012 and 2013, all of which was available for withdrawal the day after the deposit. [R 763-64].

N.J.S.'s post ruling affidavit and the payment ledger she presented after the April 25, 2013 Order reflect that she allegedly spent the money as quickly as humanly possible. She did so with actual knowledge that the issues were being litigated and under submission. Her actions were premeditated and calculated to preempt the Court and claim that the funds were "unavailable". The actions are egregious given that N.J.S. is an attorney with superior knowledge of litigation procedure. The Trial Court, seeing N.J.S.'s actions for what they were, and having the evidence before it sufficient to support recoupment, properly exercised its discretion to deny her request to overturn its decision. [R 812].

REPLY AND CROSS APPEAL RESPONSE ARGUMENT

I. N.J.S. has Not Addressed the Need or Importance of Applying an Abuse of Discretion Standard to trial court decisions regarding Child Support matters.

N.J.S. refers to C.D.G.'s argument regarding that a trial court should have discretion in fashioning child support orders as "frivolous." The accusation is made without reference or opposition to the substance or cases cited in C.D.G's argument and the purposes behind the Child Support statutes. She has not addressed C.D.G's position that the Trial Court did not base its decision on the provisions of KRS 403.211(15) or an interpretation thereof. The Trial Court did not even cite the statute as the basis for the decision. Instead, the Trial Court issued its Order

based upon the evidence provided at the March 13, 2013 hearing, and its long standing authority to fashion appropriate and equitable child support orders.

N.J.S. has presented nothing to this Court that would oppose the application of an abuse of discretion standard under CR 52.01 when reviewing child support decisions. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986); *Ghali v. Ghali*, 596 S.W.2d 31, 32 (Ky. 1980). She has not addressed the holding of *Jones v. Hammond* 329 S.W.3d 331, 334 (Ky. App. 2010); *Marshall v. Marshall,* 15 S.W.3d 396 (Ky. App. 2000), or *Brown v. Brown,* 952 S.W.2d 707 (Ky. App. 1997). Importantly, *Brown,* specifically held that a trial court has broad discretion to fashion child support orders for situations not addressed by the statutory scheme.

Here, the Trial Court found that the $1,256.00 in SSA benefits was due to C.D.G.'s earnings and employment record, and should be applied against his child support obligation. This is a factual finding unchallenged by N.J.S., and therefore, should stand. The Trial Court also found that N.J.S. had sufficient funds to repay the overpaid child support. The Trial Court found that to deny C.D.G. recoupment would be unjust and inequitable. This too is a matter subject to the Trial Court's discretion. *See Van Meter v. Smith,* 14, S.W.3d 569 (Ky. App. 2000); *Clay v. Clay*, 707 S.W.2d 352 (Ky. App. 1986).

There is nothing in case law or the statute that deprives the Trial Court of the discretion to make either finding. C.D.G. again states that the limiting the question to one section of the statute (KRS 403.211(15)), places an impossible burden upon trial courts dealing with any child support issue. Drawing from social security retirement is not any different than drawing from a 401(k) retirement. Both accounts reflect savings and deductions from income earned over the course of a lifetime of work. C.D.G. respectfully requests that this Court apply an abuse of discretion standard, and uphold the well reasoned and unchallenged findings of the Trial Court.

II. The Entire Statutory Scheme Supports a Trial Court's Discretion to apply a credit where child benefits are paid as a result of social security retirement benefits, and there is Nothing in KRS 403.211(15) that prohibits it.

In response to C.D.G's position that the entire statutory scheme supports the Trial Court's decision, N.J.S. argues that the Trial Court expanded KRS 403.211(15), and that there is "no evidence" that the Court of Appeals failed to consider the entire child support statutory scheme. In making these arguments, N.J.S. fails to cite any record evidence or holding that would indicate a consideration of the entire statutory scheme by the Court of Appeals. The Court of Appeals decision specifically limits the holding to KRS 403.211(15) and does not address the existence of KRS 403.211 (3)(d), KRS 403.211 (3)(g), KRS 403.211(4), KRS 403.212(2)(b), and numerous other statutory provisions relating to child support.

N.J.S. has not opposed C.D.G.'s position that the "[t]he cardinal rule for statutory construction" requires the Court to give effect to the intent of the General Assembly, and to "…. presume that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have a meaning, and for it to harmonize with related statutes…." *Jefferson Co. Bd. Of Educ., et al v. Fell*, 391 S.W.3d 713, 718-19 (Ky. 2012), *citing Shawnee Telecom Resources, Inc v. Brown*,354 S.W.3d 542,551(Ky. 2011). Here, C.D.G. submits that the Court of Appeals failed to review the statute as a whole, considering all subsections, to determine whether Social Security Retirement dollars serve the same function as dollars from another source, and are thus entitled to be credited against a child support obligation. N.J.S. has not opposed this position. She cannot as the statute as a whole supports C.D.G.'s position that his retirement dollars are income and a source of satisfaction of child support. This is the analysis that the Trial Court undertook, and that the majority of the jurisdictions in the United States take in applying a credit.

KRS Chapter 403 has many sections that address setting and paying child support. KRS 403.110 provides that Chapter 403 as a whole "... shall be liberally construed and applied to promote its underlying purposes...." KRS 403.211(3)(d) and (3)(g) permit the trial court to consider any financial resource of a child, or other "extraordinary" fact when setting child support amounts. KRS 403.211(4) permits the trial court the discretion to determine what is "extraordinary" as used in the child support statute. KRS 403.212(2)(b) absolutely requires that a trial court include as part of "gross income," the amount of ***all*** income from any source, including, "retirement ...,Social Security benefits,...,[and] disability insurance benefits ...." N.J.S. has elected to ignore all of these provisions.

Instead, N.J.S. points to the purpose of the statute as providing support for children. She contends that retirement dollars are in addition to employment income, unlike "disability benefits." This analysis misses the point. The Child is getting full child support plus a benefit. The Child is only entitled to these funds because of the long work history and extensive contributions of C.D.G. The funds are C.D.G's retirement dollars and his income per the statute, and thus, must be considered a credit in order to bring uniform affect to the statutory scheme. Both KRS 403.212(2)(b) and KRS 403.211(3)(d) - (3)(g) support this concept.

C.D.G. brought these statutory provisions to the attention of the Trial Court in his pre and post hearing submissions in support of his credit request. *[See **Ex. H,** C.D.G.'s Initial Brief]*. In holding that the retirement benefits paid are not a credit against child support, the Court of Appeals decision negates the provisions of KRS 403.212(2)(b). C.D.G. respectfully requests that this Court reverse the Court of Appeals decision and declare that parents who have dutifully paid into the retirement system are entitled to seek a credit for the payments before the trial court.

III. N.J.S.'s attempts to distinguish the Decisions of *Board v. Board* and *Van Meter v. Smith* Miss the Mark.

N.J.S. claims that the *Board* case is not applicable here because it predates the statutory provision of KRS 403.211(15), and addresses social security death benefits. However, C.D.G. respectfully submits that the decision is particularly applicable here, in part, for those very differences. In *Board v. Board*, 690 S.W.2d 380, 381 (Ky. 1985), this Court dealt with the application of a credit for social security benefits not specifically addressed by statute. This is the same case. The Court held that Kentucky follows the "prevailing view of most jurisdictions in the United States in that government benefits in the form of social security for child support may be credited against the parent's liability . . . ." *Id.* Further, the *Board* Court held that Social Security death benefits should be credited, and confirmed that "[t]he trial judge's finding that the social security benefits were a set-off against child support was within the court's discretion." *Id.* KRS 403.211(15) does not address "death benefits", and N.J.S. would have this Court declare that since it does not a credit should be denied for such benefits. This cannot be correct.

Further, the *Board* Court also held that the credit was not a modification of the child support. This holding is specifically analogous to this matter. After all, N.J.S. claims that the credit issued by the Trial Court was a modification. The *Board* Court held that there is a distinction between crediting an obligation with payment made from another source and increasing, decreasing or terminating, or otherwise modifying a specific dollar amount. *Id.*

Likewise, N.J.S., argues that *Van Meter* is inapplicable because it dealt with repaying benefits to an employer benefit plan. However, what is important about *Van Meter v. Smith,* 14 S.W.3d 569 (Ky. App. 2000), *is the discussion by the* Court regarding the concept that social security benefits are like income received from an insurance policy or trust. *Id at 573.* The Court held that ". . . contributions to the social security system and [an]employer's contributions

on [an employee's] behalf are an analogous transfer of assets...," the conclusion being that the SSA benefits are payouts from the insurance policy or trust purchased by the employee, and therefore, are payments from the obligor parent. *Id.* It is undisputed in this matter that the SSA benefits in question are earned benefits based upon the work history of the C.D.G. *See 42 U.S.C. § 402(a) and (d).* It follows that the payout of these same benefits must be a credit against child support to be paid. C.D.G respectfully submits that a failure of the Court of Appeals to apply a credit and terminate his child support obligation violates *Board* and *Van Meter.*

IV. The Trial Court has Not Added Language to the Statute, but has instead exercised its discretion as authorized by *McFelia v. McFelia.*

In response to C.D.G.'s position that neither the statutory section, nor *Artrip v. Noe*, 311 S.W. 3d 229, 231 (Ky. 2010), prohibit a credit for C.D.G's retirement benefit dollars, N.J.S. argues that the credit adds language to the statute. She argues that the Legislature could have added the language to the statute, but did not. However, this Court has recognized that even after the enactment of the Family Support Act, the trial courts of this Commonwealth have retained considerable discretion in child support matters. *Com. ex rel. Marshall v. Marshall*, 15 S.W.3d 396, 400 (Ky. Ct. App. 2000). The trial courts have retained broad discretion in deviating from statutory provisions when addressing child support issues. *See McFelia v. McFelia,* 406 S.W.3d 838, 839-840 (Ky 2013) (trial court's have broad discretion in domestic relations cases, and the law demonstrates the need for such discretion including the provisions of KRS 403.211 "application would be unjust or inappropriate because of an extraordinary nature."). There are countless factual situations (such as health savings accounts, flexible spending accounts, tax credits, earned income credits etc.) that are not specifically addressed by the statutory scheme that occur on a daily basis in family court matters. A trial court should have the ability to apply its discretion and weigh the equities of each matter. Both the statutory scheme, and the case law

from Kentucky support this concept. *See* KRS 403.211(3)(d) and (3)(g); KRS 403.212(2)(b); *McFelia, supra*; *Board v. Board,* 690 S.W.2d 380 (Ky 1985); *Hamilton v. Hamilton*, 598 S.W.2d 767 (Ky. App. 1980); *Miller v. Miller*, 929 S.W.2d 202 (Ky. App. 1996).

C.D.G. again submits that requiring specific statutory authority for a trial court to exercise its discretion in applying a dollar for dollar credit based upon the source of the funds to pay child support would be a procrustean holding. The decision punishes a hard working paying parent, who is over retirement age, and desiring to retire, reduce income, and use the benefits he accumulated over a lifetime of working. The decision provides a windfall to a custodial parent who allegedly spent over $20,000 in questionable expenses in three (3) days. There is no logical reason to provide a Child with triple support. A decision requiring a trial court to explain why such credits were provided protects all parties involved.

V. The Court of Appeals decision places Kentucky in the Minority of Jurisdictions by relying upon the *Wong* Decision.

As N.J.S. points out, the Court of Appeals adopted the holding of *Wong v. Hawk,* 55 S.3d 425 (Me. 2012), finding that "reading the statutory provision to apply to retirement accounts as well would render superfluous the provision's reference to dependent benefits based on a disability." [Opinion at p.7]. The Court of Appeals held that it was compelled to presume that the absence of specific mention of retirement dollars in the statute meant that it was purposefully omitted. [Id at p. 8]. This analysis is contrary to Kentucky's prior decisions in *Board, supra, Hamilton, supra, and Miller, supra,* **as well as** the majority of jurisdictions in the United States. [*See* Initial Brief at pp. 23-25, and Ex. I, J and K therein].

C.D.G. notes that the *Wong* decision includes considerable analysis supporting C.D.G's position that a trial court should have the discretion to fashion child support orders based upon the facts of each case. *See Wong at pp. 430-32.* The father therein had retired and asked for a

deviation from the statutory guidelines due to the receipt of retirement benefits by the child. Even though direct credit was precluded by statute according to the *Wong* Court, a deviation could have been provided had the father submitted findings of fact to the trial court. The Court held that the trial court retained the discretion to deviate from the statute despite the specific statutory provision regarding disability benefits. In that regard, the *Wong* decision supports C.D.G's case that all trial courts should maintain discretion to determine child support orders under the facts of each case.

Kentucky has held that trial courts retain discretion to deal with matters not specifically addressed by the statute. *See McFelia, supra at* 839-840; *Brown, supra.* Kentucky has long held that retirement dollars are considered income for the purposes of setting child support, and a trial court may exercise discretion to deviate from statutory provisions. *See* KRS 403.212; KRS 403.211(3)(d); KRS 403.211(3)(g); and 403.211(4).

VI. N.J.S's Cross Appeal Should be Denied as Not Preserved or Without Merit as this is Not a Retroactive Modification Case, and Recoupment as Ordered by the Trial Court is Not Prohibited by Federal Law.

N.J.S. has presented two arguments on her cross appeal. She argues that the Trial Court "retroactively terminated" child support as of May 2011. She also contends that the Trial Court violated federal law by ordering her to repay the overpaid child support from the lump sum benefits. Neither argument was preserved for review, and both are without merit.

A. N.J.S. Has Failed to Preserve these Issues for Appeal.

C.D.G. initially argues, as he did in his Initial Brief, that these arguments have not been properly preserved for review by this Court. N.J.S. has failed to substantively respond to this argument other than to say that she made the arguments to the Court of Appeals. She does not oppose C.D.G's case law or her own admissions to this Court.

N.J.S.'s admits that these issues were ". . . not ruled upon by either the Family Court or the Court of Appeals." [*See Cross Motion at page 2,* ¶4]. C.D.G. respectfully submits that this admission is fatal to review of these issues by this Court. N.J.S. did not request that either Court, in particular, the Trial Court, make specific findings under the provisions of Civil Rule 52.04 regarding the "retroactive termination" of support issue or the "legal process" issue. In fact, the Trial Court did not compel payment from the social security funds, nor did the Trial Court retroactively terminate child support. The Trial Court did not make specific findings on these issues. N.J.S. did not request that the Court make specific findings regarding these issues. When a trial court fails to make specific findings and no request was made for such, the issue is waived for appellate review. *See Kentucky Lottery Corp. v. Stewart,* 41 S.W.3d 860, 864 (Ky. App. 2001); *Pegler v. Pegler*, 895 S.W.2d 580 (Ky. App. 1995).

B. This is not a Child Support Modification Case and the Trial Court Correctly terminated Child Support as of the date of the Lump Sum Back Payment

N.J.S.'s claim that the Trial Court improperly retroactively modified child support must be rejected. This is not a modification case, it is a credit case. *See Van Meter v. Smith,* 14, S.W.3d 569, 573 (Ky. App. 2000). Child support is and has been paid at the agreed upon amount from May 2011 to date. It is being paid in full (with a bonus of $481.00 per month) with C.D.G's SSA dollars. As the Trial Court correctly found, the support is being paid from funds contributed and awarded based upon C.D.G.'s earnings.

C.D.G correctly filed a motion for credit of his SSA payments against his child support obligation. The obligation to pay anything over and above the credit portion is properly terminated as of the start date for the credit dollars. *See Board v. Board,* 690 S.W.2d 380 (Ky 1985). The *Board* Court held that:

> Kentucky follows the prevailing view of most jurisdictions in the United States in that government benefits in the form of social security for child support may be credited against the parent's liability under the decree or agreement of settlement. *Citing Hamilton v. Hamilton*, 598 S.W.2d 767 (1980) (other citations omitted). . . The trial judge's finding that the social security benefits were a set-off against child support was within the court's discretion. To do so is not a "modification" [of child support] . . . .
>
> . . . There is a distinction between crediting an obligation with payment made from another source and increasing, decreasing or terminating, or otherwise modifying a specific dollar amount.

Here, as in the *Board* and *Van Meter* cases the Trial Court did not modify the child support obligation. *Board, supra at 382, Van Meter, supra at 573-74.*

C. The Trial Court's Order That C.D.G. should recoup the overpaid Child Support Amount Is Supported by the *Clay* Decision.

N.J.S. contends, without analysis, that the Trial Court violated the holding of *Clay v. Clay*, 707 S.W.2d 352 (Ky. App. 1986), by ordering her to repay the overpaid child support. [N.J.S. Brief at p. 15]. In fact, the Trial Court very clearly considered the *Clay* holding in its findings. [See Order at p. 3, Initial Brief Ex. F]. N.J.S. who failed to request specific findings from the Trial Court now argues that the Trial Court failed to consider her evidence. In fact, after considering all of the evidence and all of the filings, the Trial Court correctly found that recoupment was warranted. The Trial Court found that such a result would be both equitable and just given the record. [R 742]. The Court of Appeals agreed that the equities of the situation were in C.D.G.'s favor, but limited the Opinion to KRS 403.211(15) thus denying equitable relief. N.J.S. who paid the $17,050 Judgment without bond, now seeks to capitalize on the Court of Appeals Opinion. The affect on C.D.G. would to take his refund away, and reward N.J.S. for her delay and provide her with nearly triple payment ($775.00 monthly (or $17,050) + the lump sum payment of $23,780).

C.D.G. submits that *Clay v. Clay*, supports recoupment in this matter. In Clay, the Court held that:

> Where is the recoupment to come from? If the direct recipient - the custodial parent, usually - has not, in fact, expended the 'overpayment' for the support of the child and has it, ***or its equivalent*** (in whole or in part), available for repayment, it is only fair and just that the paying parent be able to recover it. Thus, the power of a court to order or permit recoupment should not be denied. *Clay*, supra at 354. [Emphasis Added].

The Court thereafter stated that whether a trial court should grant recoupment is based on its discretion and the relevant evidence. The Court stated:

> Whether, and to what extent, the receiving parent in fact used the 'overpayment' for the support of the child and has the funds from which to permit a proper recoupment without depriving the child, is a determination that must necessarily be made by the trial court, exercising its discretion upon the relevant evidence before it. The scope of the discretion, and the principles applicable to its exercise, with respect to allowing recoupment must be substantially the same as pertain to the fixing of child support in the first instance; and thus, the determination of the court will not be disturbed on appeal unless it is found to be clearly erroneous. *Clay*, supra, at 354.

Here, the Trial Court correctly determined that N.J.S. had the funds, or the equivalent and could use those funds or the equivalent for repayment. N.J.S. takes the position that since (within three (3) days of receipt of the lump sum) she disbursed every penny of disputed, overpaid funds, she cannot be compelled to repay the monies she owes to C.D.G. C.D.G again submits that N.J.S.'s argument is a bold attempt at a grift. The expenditure of $23,780 in less than a week, equates to over $1.2 Million of expenditures for the child during the course of the year. N.J.S. own affidavit and her payment ledger presented ***after*** the April 23, 2013 Order, are proof of a premeditated attempt to preempt the Trial Court's discretion based on a claim that the funds for recoupment were "unavailable".

The evidence before the Trial Court however, is inconsistent with the concept that N.J.S. had no funds available to satisfy the overpayment. The Trial Court had before it an outline of

how N.J.S. allegedly spent the money. It also had before it evidence of N.J.S.'s income of over $156,000 per year. It had before it evidence of N.J.S.'s claim that in 22 months she allegedly spent $52,489.32 from her own funds on the Child.[2] [R 415-524; VR 30:3/13/13 04:01:45-04:04:06].

The Trial Court had the evidence that the alleged expenditures pre-dated the lump sum award, and were made from credit cards, and, at least, two different checking accounts. The evidence included payments for toys, daycare, house payments, and taxes that were for Mr. Schook, and N.J.S.'s other ***five*** children. A full review of the receipts, checks and contradictory statements of N.J.S., combined with the procedural history of N.J.S.'s actions, supported recoupment. There is ample evidence in the record to affirm the Trial Court's decision.

This Court, and Courts in other jurisdictions, looking at recoupment issues, has considered the equities of each situation along with the actions of the recipient while under notice of the dispute. *See Connelly v. Degott*, 132 S.W.3d 871, 873 (Ky. App. 2003); *In re Marriage of Tollison,* 566 N.E. 2d. 852, 854 (Ill. App. 1991)(recipient of an overpayment was on notice of the dispute and fairness demanded reimbursement)(attached at Initial Brief, **Ex. L**); *Juttelstad v. Juttelstad,* 587 N.W.3d 447, 451-2(S.D. 1998)(holding recipient of overpayment on notice of dispute would be unjustly enriched if recoupment not permitted)*(attached Initial Brief,* **Ex. M***)*.

In *Connelly*, this Court noted that the policy considerations which form the basis for the *Clay* decision were not meant to protect litigants who mislead and attempt to deceive the Court. *See Connelly v. Degott*, 132 S.W.3d 871, 873 (Ky. App. 2003)(holding a spouse was required to repay overpaid child care expenses despite the expenditure of the funds). A ". . . litigant cannot

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[2] C.D.G. disputes the validity of these calculations as representative of expenditures for the Child as they are grossly overstated including payments for attorney fees, for her other children, and other expenditures that are not properly considered. The fact that she would even claim these expenses completely undermines her credibility.

misrepresent the facts, attempt to hide the truth from [the other party] and the court, and avoid the consequences of those actions." *Id.* In *Connelly,* the Court specifically considered the motive and actions of the spouse who got the overpayment, and permitted recovery. The Court found that requiring payment from ***other*** funds was fair and not a detriment to the Child.

The Court, in *Van Meter v. Smith*, 14 S.W.3d 569 (Ky. App. 2000), held that ". . . recoupment or repayment of dependent benefits may be appropriate to avoid double recovery or payment by either parent." In such situations, the reimbursement merely returns the parties to the positions mandated by the support order of the Court.

Importantly, there was no showing at the March 13, 2013 hearing that the Child would be harmed in any way by the repayment. The Child is currently receiving the full amount of the child support, plus an additional $481.00 per month. Thus, an important consideration of the *Clay* Court is met. The Child is not deprived of any benefit.

On the other hand, if recoupment was reversed, N.J.S. would be rewarded for her delay and intentional deceptive actions perpetrated against C.D.G. and the Trial Court. She receives nearly a "triple dip" of child support. Such a result would violate not only the Court of Appeals' ruling on the proper use of a trial court's recoupment powers concerning child support, but also common sense. A decision for recoupment encourages honesty and fairness, and discourages trickery and deceit. It is a decision that is important for the entire Family Court system.

Further, recoupment of child support from N.J.S. is supported by the decision in *Artrip v. Noe*, 311 S.W. 3d 229 (Ky. 2010), where this Court stated:

> The Social Security benefits paid to a child because of a parent's disability are not a mere gratuity. Here, the benefits were generated by Noe's own earnings, with the attendant payment of Social Security taxes. Hence, the payments are properly regarded as a substitute for support payments from Noe's own earnings. *Artrip*, supra at 233.

The substitution of the payment, and the holding that the payment is not a gift supports recoupment on the facts in this present case. The Trial Court had sufficient evidence to find that the funds for recoupment were available. The Trial Court did not abuse its discretion, or violate the underpinnings of the *Clay* decision, in requiring recoupment.

Finally, even the language of KRS 403.211(15) supports recoupment. The General Assembly stated: "An amount received in excess of the child support obligation shall be credited against a child support arrearage owed by the parent that accrued subsequent to the date of the parental disability, ..." If a credit is allowed for a defaulting obligor (who thus has an arrearage), then the case for credit for a non-defaulting obligor is both equitable and compelling. It follows that C.D.G. should be entitled to recoup the $775.00 per month that he paid during the same benefit period (May, 2011 to March 2013) since the Child's dependent benefits of $1,256 per month are now effective.

D. Federal Law Does not Prohibit Recoupment from N.J.S.

N.J.S. continues to claim that the Trial Court ". . . violated 42 U.S.C Chapter 7 et seq. by ordering payment to C.D.G. of retroactive child support from the child's lump sum Social Security benefits in contravention of federal law." [N.J.S. Brief at 15-16]. She contends that the Order constituted "legal process against Social Security benefits . . . ." *Id.* N.J.S. has not responded to C.D.G's Initial Brief submissions that recoupment from her funds, or the lump sum is permitted and appropriate.

N.J.S. ignores this Court's holding in *Commonwealth of Kentucky, Cabinet for Health & Family Servs v. Ivy*, 353 S.W.3d 324, 338 (Ky. 2011), which addressed the issue of whether 42 U.S.C. §407(a) prohibits Kentucky family courts from issuing orders affecting SSA benefits. The *Ivy* case also addressed the concept of whether KRS 403.212 (including Social Security

dollars as income for purposes of child support) was in conflict with federal law. The Court held that the provisions did not conflict, and did not violate the Supremacy Clause.

Instead, the Court confirmed that the purpose of Section 407(a) was to protect the agency from legal process, not the individual, and since the agency was not a party to the proceeding, Section 407(a) could not be seen to prevent the action. Here, the SSA is not a party to the matter and this provision cannot be seen as in conflict with or prevent the collection of the overpaid funds from N.J.S. herself.

N.J.S. had not responded to the *Ivy* Court citation to the United States Supreme Court decision in *Rose v. Rose* 481 U.S. 619, 107 (1987). Importantly, the *Rose* decision supports CDG's position and discredits NJS's arguments against recoupment of the overpayments based on the facts in the present case. The Court in *Ivy noted:*

> Looking at the legislative history of 38 U.S.C. § 3101(a), the Rose Court explained that the anti-attachment provision served two purposes:
>
> to avoid the possibility of the Veterans' Administration being placed in the position of a collection agency, and to prevent the deprivation and depletion of the means of subsistence of veterans dependent upon these benefits as the main source of their income. 481 U.S. at 630, 107 S.Ct. 2029 (citations and internal quotation marks omitted). The contempt proceeding constrained neither purpose, the Court ruled, since the Administrator "was not obliged to participate in the proceeding or to pay benefits directly to appellee," *id.,* and since the state court's exercise of jurisdiction over the recipient's benefits did not "deprive appellant of his means of subsistence contrary to Congress' intent, for these benefits are not provided to support appellant alone." *Id. Com., Cabinet for Health & Family Servs. v. Ivy*, 353 S.W.3d 324, 338-39 (Ky. 2011).

The *Ivy* Court went on to hold that 42 U.S.C § 659(a) is an exception to the provisions of Section 407 (a). The Court held that Section 659 (a) can support the garnishment of SSA benefits when "the entitlement to which is based upon remuneration for employment." Here, the SSA benefits were based upon remuneration for employment, and are thus subject to attachment.

It is important to remember that the Trial Court ordered that "funds" were available for repayment from N.J.S. This is a concept supported by *Clay v. Clay*, 707 S.W. 2d 352 (Ky. App. 1986), as discussed above. In *Clay*, it was held that ". . . it is only fair and just that the paying parent be able to recover [an overpayment], [and]... the power of a court to order . . . recoupment should not be denied." *Clay*, supra at 354. The *Clay* Court confirmed that whether a trial court should grant recoupment is based on its discretion and the relevant evidence. *See also Connelly v. Degott*, 132 S.W.3d 871, 873 (Ky. App. 2003); *In re Marriage of Tollison,* 566 N.E. 2d. 852, 854 (Ill. App. 1991)(recipient of an overpayment was on notice of the dispute and fairness demanded reimbursement); *Juttelstad v. Juttelstad,* 587 N.W.3d 447, 451-2(S.D. 1998)(holding recipient of overpayment on notice of dispute would be unjustly enriched if recoupment not permitted).

N.J.S. continues to rely upon the holding of *Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler,* 537 U.S. 371, 375 (2003). However, this is not the law in Kentucky, nor is it the holding of the *Washington* case. In *Washington*, the Court permitted recoupment. Further, *Washington* has been interpreted to hold that the term "other legal process" in 42 U.S.C. § 407(a) means, legal processes of the same nature as the specific items listed (levy or attachment actions). *See Ali v. Fed. Bureau of Prisons*, 552 U.S.214 (2008).

Importantly, C.D.G. did not seek levy or attachment. The Trial Court did not enforce or inflict levy or attachment. C.D.G. sought and received **recoupment from N.J.S.** for monies which he already paid to N.J.S. She chose to appeal without a bond, and paid the obligation ordered by the Trial Court from money she acquired from Mr. Zielke. [*See Court of Appeals Brief for Appellant at p.15*]. Thus, the lump sum benefits were not even affected.

C.D.G. further submits that where issues of Child Support are concerned the provisions of 42 U.S.C § 407(a), are displaced by the provisions of 42 U.S.C § 659 (a) and (b). This Statute permits recoupment in child support matters. *See Bailey v. Fischer,* 946 So.2d 404 (Miss Ct. App. 2006) (copy attached, at Initial Brief, **Ex. N**). This Court has recognized that the lump sum funds are properly used for the re-payment or re-fund of child support. *See Van Meter v. Smith,* 14, S.W.3d 569 (Ky. App. 2000) (permitting use of the lump sum benefits to repay overpaid child support). Thus, the Trial Court was within its authority to compel N.J.S. to return the overpayment from her funds ***or*** the lump sum funds.

CONCLUSION

C.D.G. respectfully requests that this Court reverse the Court of Appeals decision and reinstate the Trial Court's opinion. N.J.S. should not be rewarded for her intentional delay and receive a triple dip of funds. Trial Courts of this Commonwealth should be permitted to exercise discretion and formulate equitable relief under the specific facts of each case. Based on the facts and authorities discussed above, this Court should affirm the Trial Court's decision in all respects.

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Respectfully submitted,

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